

ESTTA Tracking number: **ESTTA534055**

Filing date: **04/24/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056978
Party	Defendant McAirlaids, Inc.
Correspondence Address	Michael J. Hertz Woods Rogers PLC 10 South Jefferson Street Suite 1400 Roanoke, VA 24011 UNITED STATES mhertz@woodsrogers.com
Submission	Motion to Suspend for Civil Action
Filer's Name	Michael J. Hertz
Filer's e-mail	mhertz@woodsrogers.com
Signature	/Michael J. Hertz/
Date	04/24/2013
Attachments	Respondent's Motion to Suspend Proceedings in the TTAB.pdf (2 pages) (59198 bytes) Memorandum in Support of Respondent's Motion to Suspend Proceedings in the TTAB.pdf (5 pages) (147849 bytes) Exhibit A.pdf (2 pages) (44436 bytes) Exhibit B.PDF (12 pages) (395497 bytes) Exhibit C.PDF (24 pages) (814960 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

KIMBERLY-CLARK GLOBAL SALES, LLC)	
AND KIMBERLY-CLARK WORLDWIDE, INC.,)	
)	
Petitioners,)	
)	
v.)	Cancellation Proceeding No. 92056978
)	
MCAIRLAIDS, INC.,)	
)	
Respondent.)	

RESPONDENT'S MOTION TO SUSPEND PROCEEDINGS IN THE TTAB

NOW COMES Respondent McAirloads, Inc. ("Respondent"), by counsel, and states as follows:

1. Respondent moves for an order suspending the above-captioned proceeding in the Trademark Trial and Appeal Board ("TTAB"), pending the outcome of the concurrently pending federal lawsuit in the United States District Court for the Western District of Virginia (Civil Case No. 7:12-CV-00578, filed November 20, 2012).

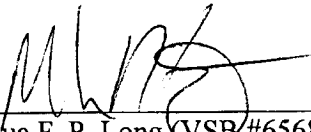
2. The grounds for this motion are that there is a concurrently pending action in the United States District Court for the Western District of Virginia and that all matters at issue in the present TTAB proceeding will be considered in the District Court proceedings. Additionally, matters not at issue in the TTAB proceeding will be at issue in the District Court proceeding. Therefore, not suspending the TTAB proceeding would be a duplicitous waste of the court's and TTAB's resources. The TTAB has the authority to stay proceedings, pending the outcome of concurrently pending civil actions whose outcomes may have a direct bearing on the TTAB proceedings. The TTAB may exercise this authority to stay on its own initiative, upon motion,

or upon stipulation of the parties approved by the Board. Granting this motion will allow the matters at issue to reach a final determination, since District Court rulings are generally binding on the TTAB. Further, a grant of this motion will conserve the parties' resources and promote judicial economy, as all issues may be adjudged by a single decisional body.

3. This motion is based on the pleadings and papers on file in this case and the attached memorandum of points and authorities and exhibits.

Respectfully Submitted,

Dated: April 24, 2013



Joshua F. P. Long (VSB #65684)
Michael J. Hertz (VSB #71079)
F. Elizabeth Burgin Waller (VSB #74726)
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Attorney for Registrant/Respondent
MCAIRLAIDS, INC.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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KIMBERLY-CLARK GLOBAL SALES, LLC)	
AND KIMBERLY-CLARK WORLDWIDE, INC.,)	
)	
Petitioners,)	
)	
v.)	Cancellation Proceeding No. 92056978
)	
MCAIRLAIDS, INC.,)	
)	
Respondent.)	

**MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO SUSPEND
PROCEEDINGS IN THE TTAB**

NOW COMES Respondent McAirloads, Inc. ("Respondent"), by counsel, and states as follows:

I. INTRODUCTION & FACTS

On or about February 28, 2012, the United States Patent and Trademark Office ("PTO") issued United States Registration No. 4,104,123. This federally registered trademark is for a trade dress commonly described as a repeating pattern of embossed dots for use in connection with, among other products, absorbent incontinence bed pads in International Class 010. The PTO correctly issued a registration for the trade dress on the principal register after consideration of all relevant arguments. At no point during the application process was a timely opposition made by Petitioners nor anyone else. A copy of the Certificate of Registration is attached herewith as Exhibit A.

On or about November 20, 2012, Respondent filed suit against Petitioners and Kimberly-Clark Corporation in the United States District Court for the Western District of Virginia (Civil Case No. 7:12-cv-00578, hereinafter referred to as "Plaintiff's Lawsuit"). A file-stamped copy

of the Complaint in Plaintiff's Lawsuit is attached hereto as Exhibit B. Plaintiff's Lawsuit asserts trade dress infringement and unfair competition related to Petitioners' GoodNites absorbent incontinence pads ("Petitioners' Product").

On or about January 16, 2013, Petitioners filed an Answer and Counterclaim seeking to Plaintiff's Lawsuit seeking, among other relief, cancellation of Respondent's United States Trademark Registration No. 4,104,123 pursuant to 15 U.S.C. § 1064 and 15 U.S.C. § 1119. A copy of the Answer and Counterclaim is attached hereto as Exhibit C.¹

Thereafter, on or about March 25, 2013, Petitioners also filed the Petition for Cancellation to which this motion relates. As with Petitioner's Counterclaim, their petition before the TTAB seeks to cancel Respondent's United States Registration No. 4,104,123, claiming that the trade dress is functional and non-distinctive. On April 10, 2013, the TTAB issued a notice to the parties in which Respondent was provided 20 days to file a copy of the pleadings in Plaintiff's Lawsuit so that the TTAB could determine whether the TTAB proceeding should be suspended. This is Respondent's response to the TTAB's request.

II. ARGUMENT

The TTAB has inherent power to stay proceedings and it may exercise this power upon its own initiative, upon motion, or upon stipulation of the parties approved by the TTAB. *See* 37 C.F.R. § 2.117. Whenever it comes to the attention of the TTAB that a party or parties to a case pending before it are involved in a civil action which may have a bearing on the TTAB case, proceedings before the TTAB may be suspended until final determination of the civil action. *See* 37 C.F.R. § 2.117(a); *See also, General Motors Corp. v. Cadillac Club Fashions, Inc.*, 22 U.S.P.Q.2d 1933 (TTAB 1992).

¹ Respondent notes that while Plaintiff's Lawsuit was referenced in Petitioners' Petition to Cancel Petitioners failed to reference the fact that they had already filed a Counterclaim in the civil action seeking the same relief as sought in this action: Cancellation of Respondent's registered trade dress.

Typically, the TTAB will stay proceedings when identical issues may be decided in Federal Court in a concurrently pending action. *Townley Clothes, Inc. v. Goldring, Inc.*, 100 U.S.P.Q.57, 58 (Comm'r of Patents 1953) ("it is deemed the sounder practice to suspend the [TTAB] proceedings pending termination of the Court action.") The reason for this practice is that District Court decisions are generally binding on the TTAB, but TTAB decisions are not binding on District Courts. *See* TBMP § 510.02(a).

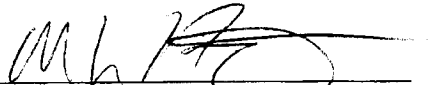
Indeed, the law vests the District Court with original jurisdiction to consider the same issues which are presently before the TTAB in this matter. *See* 15 U.S.C. § 1119 (courts may determine the right to registration or order cancellation of a mark). Finally, because this action involves issues which cannot, and will not, be resolved by the TTAB, a decision by the TTAB will leave several issues undecided. For instance, the TTAB lacks jurisdiction to address several key matters at issue in Plaintiff's Lawsuit other than whether Respondent has the right to maintain a federal trademark registration, so it is without authority to rule on claims for infringement of Respondent's federally registered trade dress, unfair competition claims, fees and costs issues, or other related causes of action. Thus, rather than wasting resources on litigation that will not resolve the dispute, it makes the most sense to defer rulings to the Court with the greatest authority to rule on all the issues present in this case.

III. CONCLUSION

For these reasons, Respondent respectfully requests that the TTAB grant the motion to suspend proceedings, pending final resolution of the Plaintiff's Lawsuit currently before the United States District Court for the Western District of Virginia.

Respectfully Submitted,

Dated: April 24, 2013



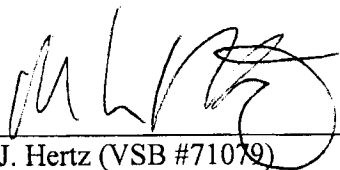
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Attorney for Registrant/Respondent
MCAIRLAIDS, INC.

CERTIFICATE OF SERVICE

I, Michael J. Hertz, do hereby certify that on April 24, 2013, I served a true and correct copy of the foregoing RESPONDENT'S MOTION TO SUSPEND PROCEEDINGS IN THE TTAB AND MEMORANDUM SUPPORT THEREOF by USPS First Class on:

Chad J. Doellinger
Breighanne A. Eggert
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, IL 60661-3693

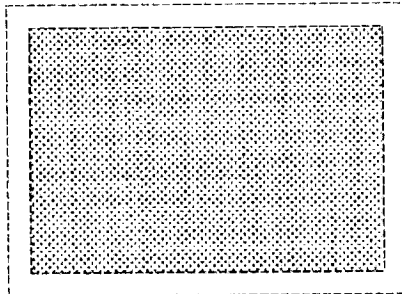


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Exhibit A

United States of America

United States Patent and Trademark Office



Reg. No. 4,104,123

Registered Feb. 28, 2012

Int. Cl.: 10

TRADEMARK

PRINCIPAL REGISTER

MCAIRLAIDS, INC. (VIRGINIA CORPORATION)
180 CORPORATE DRIVE
ROCKY MOUNT, VA 24151

FOR: ABSORBENT PADS FOR MEDICAL OR HYGIENIC USE, NAMELY, ABSORBENT SURGICAL PADS, ABSORBENT WOUND CARE PADS, ABSORBENT INCONTINENCE BED PADS, ABSORBENT BIRTHING PADS, AND ABSORBENT OPERATING ROOM FLOOR PADS, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 2-0-1999; IN COMMERCE 7-0-2005.

THE STIPPLING IS A FEATURE OF THE MARK AND DOES NOT INDICATE COLOR.

THE MARK CONSISTS OF A THREE-DIMENSIONAL CONFIGURATION OF THE GOODS WHERE THE MARK IS A REPEATING PATTERN OF EMBOSSED DOTS ON THE GOODS. THE DASHED LINES AND AREA BETWEEN THE DASHED LINES ARE MERELY TO SHOW PLACEMENT OF THE MARK ON THE GOODS AND ARE NOT CLAIMED AS A FEATURE OF THE MARK.

SEC. 2(F).

SER. NO. 85-192,216, FILED 12-7-2010.

CHARLOTTE CORWIN, EXAMINING ATTORNEY



David J. Kyros

Director of the United States Patent and Trademark Office

EXHIBIT

A

Exhibit B

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

McAIRLAIDS, INC.

Plaintiff

v.

**KIMBERLY-CLARK
CORPORATION,**

**KIMBERLY-CLARK
WORLDWIDE, INC., and**

**KIMBERLY-CLARK
GLOBAL SALES, LLC**

Defendants

Civil Action No. 7:12-CV-00578

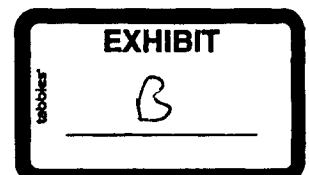
TRIAL BY JURY DEMANDED

COMPLAINT

Plaintiff, McAirlands, Inc. ("McAirlands"), by counsel, for its Complaint against Defendants Kimberly-Clark Corporation ("Kimberly-Clark Corp."), Kimberly-Clark Worldwide, Inc. ("Kimberly-Clark Worldwide"), and Kimberly-Clark Global Sales, LLC ("Kimberly-Clark Global Sales"), (collectively, "Kimberly-Clark"), states as follows:

1. This is an action for federal trade dress infringement for the unauthorized use, adoption, appropriation and/or copying of McAirlands' federally registered and common law trade dress in violation of Section 32(1)(a) of the Lanham Act, 15 U.S.C. § 1114(1)(a) and the common law; and for federal and common law unfair competition and false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the common law. McAirlands seeks temporary, preliminary and permanent injunctive relief to prevent further unauthorized and deceptive usage of McAirlands' federally registered and common law trade dress, as well as damages, punitive damages, costs and attorney's fees.

{#1566886-1, 108811-00000-01}



PARTIES, JURISDICTION AND VENUE

2. McAirlands is a Virginia corporation with its principal place of business in Rocky Mount, Virginia.

3. Upon information and belief, Kimberly-Clark Corp. is a Delaware corporation with its principal place of business in Neenah, Wisconsin.

4. Upon information and belief, Kimberly-Clark Worldwide is a Delaware corporation with its principal place of business in Neenah, Wisconsin. Kimberly-Clark Worldwide is a wholly owned subsidiary of Kimberly-Clark Corp.

5. Upon information and belief, Kimberly-Clark Global Sales is a Delaware limited liability company with its principal place of business in Neenah, Wisconsin.

6. This Court has personal jurisdiction over Kimberly-Clark because Kimberly-Clark transacts substantial business in the Commonwealth of Virginia and because Kimberly-Clark is subject to jurisdiction under Virginia Code Section 8.01-328.1.

7. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331, 1332, and 1338(a) & (b), and has supplemental jurisdiction over the state common law claims under 28 U.S.C. § 1367(a).

8. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) & (c), and because a substantial part of the events or omissions giving rise to McAirlands' claims against Kimberly-Clark occurred in the cities or counties constituting the Roanoke Division.

FACTS COMMON TO ALL COUNTS

9. At all times since 2005, McAirlands has been in business in the United States manufacturing, selling and marketing medical and hygienic absorbent pads, including absorbent incontinence bed pads.

10. At all times since 2005, McAirlaids' absorbent pads have had a distinctive and nonfunctional trade dress design consisting of a point pattern of repeating embossed dots (the "McAirlaids Trade Dress").

11. McAirlaids owns U.S. Registration No. 4,104,123 for the McAirlaids Trade Dress which was issued on the Principal Register by the United States Patent and Trademark Office on February 28, 2012. A copy of the registration certificate for the McAirlaids Trade Dress is attached hereto as Exhibit A and is incorporated herein by reference. McAirlaids' federal trademark registration gives McAirlaids the exclusive right to use the McAirlaids Trade Dress throughout the United States.

12. Since 2005, McAirlaids has sold over 150 Million absorbent pads with the McAirlaids Trade Dress in the United States.

13. Companies in the absorbent pad industry use their respective trade dress patterns to package their pads in order for consumers to readily identify one company's pad from the others. To that end, McAirlaids advertises and markets its absorbent pads with the McAirlaids Trade Dress through, among other channels, brochures, trade shows, and the Internet. Since 2005, McAirlaids has spent substantial sums in advertising and marketing its absorbent pads with the McAirlaids Trade Dress in the United States. A representative advertisement for McAirlaids' absorbent pads which prominently features and promotes the McAirlaids Trade Dress is attached hereto as Exhibit B and is incorporated herein by reference.

14. McAirlaids has developed substantial goodwill in the McAirlaids Trade Dress, which is associated closely with McAirlaids' absorbent pads, and which serves to identify and distinguish McAirlaids' absorbent pads from those of others and to indicate the source, origin, sponsorship and affiliation of McAirlaids' absorbent pads.

15. Beginning in or around April 2012, Kimberly-Clark began importing, distributing, selling and marketing absorbent incontinence bed pads under its GoodNites® Brand. Kimberly-Clark's press release announcing the introduction of its GoodNites® Bed Mats is attached hereto as **Exhibit C** and is incorporated herein by reference. Like McAirLaid's absorbent incontinence bed pads, Kimberly-Clark's GoodNites® Bed Mats have a design consisting of a point pattern of repeating embossed dots (the "Infringing Trade Dress").

16. Kimberly-Clark advertises and markets its GoodNites® Bed Mats with the Infringing Trade Dress through, among other channels, brochures, medical advertising, and the Internet. An excerpt from Kimberly-Clark's webpage for its GoodNites® Bed Mats www.goodnites.com (the "Kimberly-Clark Website") which prominently features and promotes the Infringing Trade Dress is attached hereto as **Exhibit D** and is incorporated herein by reference.

17. In addition, Kimberly-Clark prominently features and promotes the Infringing Trade Dress on its store signage, displays and packaging for its GoodNites® Bed Mats. Photographs of Kimberly-Clark's packaging for its GoodNites® Bed Mats which prominently features and promotes the Infringing Trade Dress are attached hereto as **Exhibit E** and are incorporated herein by reference.

18. Kimberly-Clark has used, adopted, appropriated and/or copied, without authorization, the McAirLaid's Trade Dress. Photographs of McAirLaid's absorbent incontinence bed pads and Kimberly-Clark's GoodNites® Bed Mats depicting their identical point pattern design are attached hereto as **Exhibit F** (McAirLaid's absorbent incontinence bed pads) and **Exhibit G** (Kimberly-Clark's GoodNites® Bed Mats) and are incorporated herein by reference.

19. McAirLaid's has not licensed the McAirLaid's Trade Dress to Kimberly-Clark, nor has McAirLaid's authorized Kimberly-Clark to use or copy the McAirLaid's Trade Dress in any way.

20. Through its use, adoption and/or copying of the McAirLaid's Trade Dress, without any authorization, Kimberly-Clark is attempting to use or mimic the McAirLaid's Trade Dress in which McAirLaid's has invested significant time, money, and other resources.

21. Kimberly-Clark's use, adoption, appropriation and/or copying of the McAirLaid's Trade Dress to identify, advertise, market, promote and sell the same or similar type of products sold by McAirLaid's, has caused, and unless enjoined is likely to continue to cause, confusion or mistake among, or to deceive, the consuming public as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirLaid's.

22. On July 13, 2012, counsel for McAirLaid's sent a letter to Kimberly-Clark demanding that Kimberly-Clark cease and desist immediately from its unauthorized use of the McAirLaid's Trade Dress (the "Cease and Desist Letter"). A copy of the Cease and Desist Letter is attached hereto as **Exhibit H** and is incorporated herein by reference.

23. In response to the Cease and Desist Letter, Kimberly-Clark denied infringing the McAirLaid's Trade Dress and refused to cease and desist. Since that time, Kimberly-Clark's use of the McAirLaid's Trade Dress has actually increased and become more pervasive.

24. McAirLaid's has been damaged as a consequence of Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirLaid's Trade Dress.

25. In addition, Kimberly-Clark's conduct will cause McAirLaid's further immediate and irreparable injury, loss and damage for which McAirLaid's will have no adequate remedy at law.

26. Kimberly-Clark's use, adoption, appropriation and/or copying of the McAirLaid's Trade Dress without authorization shows willful misconduct, malice, fraud, wantonness, oppression, or the entire lack of care which would raise the presumption of conscious indifference to its consequences.

COUNT I
(Federal Trade Dress Infringement)
(15 U.S.C. § 1114)

27. McAirloads incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

28. McAirload's owns U.S. Registration No. 4,104,123 for the McAirloads Trade Dress.

29. The McAirloads Trade Dress, as registered, is nonfunctional, inherently distinctive or has acquired secondary meaning and is associated in the mind of the public uniquely with McAirloads.

30. Kimberly-Clark's GoodNites® Bed Mats which bear the Infringing Trade Dress copy and infringe the McAirloads Trade Dress.

31. Kimberly-Clark's importing, distributing, selling and marketing of its GoodNites® Bed Mats with the Infringing Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirloads, and thus infringes McAirloads' exclusive rights in and to the McAirloads Trade Dress in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

32. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirloads Trade Dress deprives McAirloads of its exclusive right to control, and benefit from, the McAirloads Trade Dress. If permitted to continue, Kimberly-Clark's actions will nullify McAirloads' right to the exclusive use of the McAirloads Trade Dress, free from infringement, and will have a substantial and adverse effect on McAirloads' existing and projected future interstate business of marketing and selling its absorbent pads bearing the McAirloads Trade Dress in violation of 15 U.S.C. § 1114.

33. Kimberly-Clark's unauthorized use of the McAirLaid's Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirLaid's advertising and promotion and from the resultant goodwill in the McAirLaid's Trade Dress.

34. Kimberly-Clark's actions have damaged and continue to damage McAirLaid's and its business.

35. Unless temporarily, preliminarily and permanent enjoined pursuant to 15 U.S.C. § 1116, Kimberly-Clark's conduct will cause McAirLaid's irreparable harm for which there exists no adequate remedy at law.

36. McAirLaid's is entitled to recover from Kimberly-Clark all damages McAirLaid's has suffered due to Kimberly-Clark's infringing conduct, costs, as well as Kimberly-Clark's profits obtained from its infringing conduct, in an amount to be proved at trial and to be trebled, pursuant to 15 U.S.C. § 1117.

37. Kimberly-Clark's actions are willful and deliberate and amount to exceptional circumstances, justifying an award of attorneys' fees to McAirLaid's pursuant to 15 U.S.C. § 1117.

COUNT II
(Federal Unfair Competition)
(15 U.S.C. § 1125(a))

38. McAirLaid's incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

39. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirLaid's Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products bearing the Infringing Trade Dress sold by Kimberly-Clark and the products bearing the McAirLaid's Trade Dress sold by McAirLaid's, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

40. Kimberly-Clark's unauthorized use, adoption, appropriation, and/or copying of the McAirLaid's Trade Dress falsely suggests an affiliation or connection with, or sponsorship or approval of, Kimberly-Clark and its products by McAirLaid's, and/or of McAirLaid's and its products by Kimberly-Clark, in violation of 15 U.S.C. § 1125(a).

41. Kimberly-Clark's actions constitute unfair competition and false designation of origin in violation of 15 U.S.C. § 1125(a).

42. Kimberly-Clark's unauthorized use of the McAirLaid's Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirLaid's advertising and promotion and from the resultant goodwill in the McAirLaid's Trade Dress.

43. Kimberly-Clark's actions have damaged and continue to damage McAirLaid's and its business.

44. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirLaid's irreparable harm for which there exists no adequate remedy at law.

45. McAirLaid's is entitled to recover from Kimberly-Clark all damages McAirLaid's has suffered due to Kimberly-Clark's infringing conduct, costs, as well as Kimberly-Clark's profits obtained from its infringing conduct, in an amount to be proved at trial and to be trebled, pursuant to 15 U.S.C. § 1117.

46. Kimberly-Clark's actions are willful and deliberate and amount to exceptional circumstances, justifying an award of attorneys' fees to McAirLaid's pursuant to 15 U.S.C. § 1117.

COUNT III
(Common Law Trade Dress Infringement)

47. McAirLaid's incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

48. McAirLaid's is the owner of all right and title to the distinctive McAirLaid's Trade Dress.

49. The McAirlaids Trade Dress is nonfunctional, inherently distinctive or has acquired secondary meaning and is associated in the mind of the public uniquely with McAirlaids.

50. McAirlaids has prior and exclusive rights to use its McAirlaids Trade Dress to identify, market, promote and sell its medical and hygienic absorbent pads, including absorbent incontinence bed pads.

51. Kimberly-Clark's GoodNites® Bed Mats copy and infringe the McAirlaids Trade Dress.

52. Kimberly-Clark's importing, distributing, selling and marketing of its GoodNites® Bed Mats with the Infringing Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirlaids, and thus infringes McAirlaids' exclusive rights in and to the McAirlaids Trade Dress in violation of the common law of the Commonwealth of Virginia.

53. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirlaids Trade Dress deprives McAirlaids of its exclusive right to control, and benefit from, the McAirlaids Trade Dress. If permitted to continue, Kimberly-Clark's actions will nullify McAirlaids' right to the exclusive use of the McAirlaids Trade Dress, free from infringement, and will have a substantial and adverse effect on McAirlaids' existing and projected future business of marketing and selling its absorbent pads bearing the McAirlaids Trade Dress in violation of the common law of the Commonwealth of Virginia.

54. Kimberly-Clark's unauthorized use of the McAirlaids Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirlaids' advertising and promotion and from the resultant goodwill in the McAirlaids Trade Dress.

55. Kimberly-Clark's actions have damaged and continue to damage McAirlaids and its business.

56. McAirLaid is entitled to recover its damages from Kimberly-Clark in an amount to be proved at trial.

57. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirLaid irreparable harm for which there exists no adequate remedy at law.

COUNT IV
(Common Law Unfair Competition)

58. McAirLaid incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

59. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirLaid Trade Dress has misled and continue to mislead and deceive the public as to the source of the products bearing the McAirLaid Trade Dress and falsely suggests a connection with McAirLaid, each of which constitutes unfair competition and false designation of origin in violation of the common law of the Commonwealth of Virginia.

60. Kimberly-Clark's actions have damaged and continue to damage McAirLaid and its business.

61. McAirLaid is entitled to recover its damages from Kimberly-Clark in an amount to be proved at trial.

62. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirLaid irreparable harm for which there exists to adequate remedy at law.

WHEREFORE, McAirLaid respectfully requests that the Court:

1. Award Judgment in favor of McAirLaid and against Kimberly-Clark on all counts of the Complaint;

2. Enjoin Kimberly-Clark temporarily, preliminarily and permanently from all unlawful and infringing acts that violate McAirLaid's rights;

{#1566886-1, 108811-00000-01}

3. Award McAirlaids its actual and compensatory damages sustained due to Kimberly-Clark's unlawful and infringing conduct, as well as all profits derived by Kimberly-Clark from its unlawful and infringing conduct, in an amount to be proved at trial and trebled;
4. Award McAirlaids recovery of its reasonable attorneys' fees, expenses and costs of prosecuting this action;
5. Award McAirlaids punitive damages;
6. Order destruction of all infringing articles;
7. Grant such other and further relief as the Court deems just and equitable; and
8. Order a trial by jury on all appropriate issues.

Dated: November 20, 2012

Respectfully submitted,

MCAIRLAIDS, INC.

By /s/ Joshua F. P. Long
Of Counsel

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Michael J. Hertz (VSB #71079)
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Counsel for Plaintiff McAirlaids, Inc.

Exhibit C

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

MCAIRLAIDS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	7:12-CV-00578
KIMBERLY-CLARK CORPORATION,)	
KIMBERLY-CLARK WORLDWIDE, INC.,)	
AND KIMBERLY-CLARK GLOBAL SALES,)	
LLC,)	
)	
Defendants.)	

ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Now come Defendants Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc. and Kimberly-Clark Global Sales, LLC (collectively, "Kimberly-Clark"), and for their answer to Plaintiff McAirloads, Inc.'s ("Plaintiff" or "McAirloads") Complaint, state as follows:

1. This is an action for federal trade dress infringement for the unauthorized use, adoption, appropriation and/or copying of McAirloads' federally registered and common law trade dress in violation of Section 32(1)(a) of the Lanham Act, 15 U.S.C. § 1114(1)(a) and the common law; and for federal and common law unfair competition and false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the common law. McAirloads seeks temporary, preliminary and permanent injunctive relief to prevent further unauthorized and deceptive usage of McAirloads' federally registered and common law trade dress, as well as damages, punitive damages, costs and attorney's fees.

Response

Kimberly-Clark admits that McAirloads alleges that this is an action for federal trade dress infringement, federal and common law unfair competition, and federal and common law false designation of origin, and that McAirloads seeks temporary, preliminary and permanent injunctive relief, as well as damages, punitive damages, costs and attorney's fees. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 1.



PARTIES, JURISDICTION AND VENUE

2. McAirLaid is a Virginia corporation with its principal place of business in Rocky Mount, Virginia.

Response

Kimberly-Clark lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph No. 2, and on that basis denies the same.

3. Upon information and belief, Kimberly-Clark Corp. is a Delaware corporation with its principal place of business in Neenah, Wisconsin.

Response

Kimberly-Clark admits that it is a Delaware Corporation. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 3. Further responding, Kimberly-Clark affirmatively avers that Kimberly-Clark Corporation is wrongly named in this litigation, as it is not involved in the sale or marketing of Kimberly-Clark products, including, but not limited to, Kimberly-Clark's GoodNites® disposable mats for children experiencing bedwetting.

4. Upon information and belief, Kimberly-Clark Worldwide is a Delaware corporation with its principal place of business in Neenah, Wisconsin. Kimberly-Clark Worldwide is a wholly owned subsidiary of Kimberly-Clark Corp.

Response

Kimberly-Clark admits the allegations of Paragraph No. 4. At the same time, however, Kimberly-Clark affirmatively avers that Kimberly-Clark Worldwide, Inc. is wrongly named in this litigation, as it is not involved in the sale or marketing of Kimberly-Clark products, including, but not limited to, Kimberly-Clark's GoodNites® disposable mats for children experiencing bedwetting.

5. Upon information and belief, Kimberly-Clark Global Sales is a Delaware limited liability company with its principal place of business in Neenah, Wisconsin.

Response

Kimberly-Clark admits the allegations of Paragraph No. 5.

6. This Court has personal jurisdiction over Kimberly-Clark because Kimberly-Clark transacts substantial business in the Commonwealth of Virginia and because Kimberly-Clark is subject to jurisdiction under Virginia Code Section 8.01-328.1.

Response

Kimberly-Clark admits that it has transacted business in the Commonwealth of Virginia.

Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 6.

7. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331, 1332, and 1338(a) & (b), and has supplemental jurisdiction over the state common law claims under 28 U.S.C. § 1367(a).

Response

Kimberly-Clark admits that, with respect to only those allegations admitted herein, subject matter jurisdiction exists.

8. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) & (c), and because a substantial part of the events or omissions giving rise to McAirlands' claims against Kimberly-Clark occurred in the cities or counties constituting the Roanoke Division.

Response

Kimberly-Clark admits that venue exists in this District. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 8.

FACTS COMMON TO ALL COUNTS

9. At all times since 2005, McAirloads has been in business in the United States manufacturing, selling and marketing medical and hygienic absorbent pads, including absorbent incontinence bed pads.

Response

Kimberly-Clark lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph No. 9, and on that basis denies the same.

10. At all times since 2005, McAirloads' absorbent pads have had a distinctive and nonfunctional trade dress design consisting of a point pattern of repeating embossed dots (the "McAirloads Trade Dress").

Response

Kimberly-Clark denies that McAirloads's absorbent pads have, or had, a distinctive and nonfunctional trade dress design consisting of a point pattern of repeating embossed dots. Kimberly-Clark lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph No. 10, and on that basis denies the same.

11. McAirloads owns U.S. Registration No. 4,104,123 for the McAirloads Trade Dress which was issued on the Principal Register by the United States Patent and Trademark Office on February 28, 2012. A copy of the registration certificate for the McAirloads Trade Dress is attached hereto as Exhibit A and is incorporated herein by reference. McAirloads' federal trademark registration gives McAirloads the exclusive right to use the McAirloads Trade Dress throughout the United States.

Response

Kimberly-Clark admits that the face of the registration certificate for U.S. Trademark No. 4,104,123 lists McAirloads as the registrant, that the registration certificate indicates it was issued on the Principal Register on February 28, 2012, and that a copy of what purports to be the registration certificate for U.S. Trademark No. 4,104,123 was attached to the Complaint as Exhibit A. Kimberly-Clark denies all remaining allegations of Paragraph No. 11.

12. Since 2005, McAirlaids has sold over 150 Million absorbent pads with the McAirlaids Trade Dress in the United States.

Response

Kimberly-Clark lacks information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph No. 12, and on that basis denies the same.

13. Companies in the absorbent pad industry use their respective trade dress patterns to package their pads in order for consumers to readily identify one company's pad from the others. To that end, McAirlaids advertises and markets its absorbent pads with the McAirlaids Trade Dress through, among other channels, brochures, trade shows, and the Internet. Since 2005, McAirlaids has spent substantial sums in advertising and marketing its absorbent pads with the McAirlaids Trade Dress in the United States. A representative advertisement for McAirlaids' absorbent pads which prominently features and promotes the McAirlaids Trade Dress is attached hereto as **Exhibit B** and is incorporated herein by reference.

Response

Kimberly-Clark lacks information sufficient to form a belief as to the truth or falsity of the allegations that McAirlaids advertises and markets its absorbent pads through, among other channels, brochures, trade shows, and the Internet, and that since 2005, McAirlaids has spent substantial sums in advertising and marketing its absorbent pads in the United States, and on that basis denies the same. Kimberly-Clark denies the remaining allegations of Paragraph No. 13.

14. McAirlaids has developed substantial goodwill in the McAirlaids Trade Dress, which is associated closely with McAirlaids' absorbent pads, and which serves to identify and distinguish McAirlaids' absorbent pads from those of others and to indicate the source, origin, sponsorship and affiliation of McAirlaids' absorbent pads.

Response

Kimberly-Clark denies the allegations of Paragraph No. 14.

15. Beginning in or around April 2012, Kimberly-Clark began importing, distributing, selling and marketing absorbent incontinence bed pads under its GoodNites® Brand. Kimberly-Clark's press release announcing the introduction of its GoodNites® Bed Mats is attached hereto as **Exhibit C** and is incorporated herein by reference. Like McAirlaids' absorbent incontinence bed pads, Kimberly-

Clark's GoodNites® Bed Mats have a design consisting of a point pattern of repeating embossed dots (the "Infringing Trade Dress").

Response

Kimberly-Clark admits that in or around April 2012, it began selling its GoodNites® disposable mats for children experiencing bedwetting, and that a copy of its March 20, 2012 press release announcing the introduction of such bed mats was attached to the Complaint as Exhibit C. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 15.

16. Kimberly-Clark advertises and markets its GoodNites® Bed Mats with the Infringing Trade Dress through, among other channels, brochures, medical advertising, and the Internet. An excerpt from Kimberly-Clark's webpage for its GoodNites® Bed Mats www.goodnites.com (the "Kimberly-Clark Website") which prominently features and promotes the Infringing Trade Dress is attached hereto as **Exhibit D** and is incorporated herein by reference.

Response

Kimberly-Clark admits that it advertises and markets its GoodNites® disposable mats for children experiencing bedwetting through media that include brochures and the Internet, and that an excerpt from Kimberly-Clark's webpage for its GoodNites® disposable mats for children experiencing bedwetting was attached to the Complaint as Exhibit D. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 16.

17. In addition, Kimberly-Clark prominently features and promotes the Infringing Trade Dress on its store signage, displays and packaging for its GoodNites® Bed Mats. Photographs of Kimberly-Clark's packaging for its GoodNites® Bed Mats which prominently features and promotes the Infringing Trade Dress are attached hereto as **Exhibit E** and are incorporated herein by reference.

Response

Kimberly-Clark admits that a copy of a package of GoodNites® disposable mats for children experiencing bedwetting was attached to the Complaint as Exhibit E. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 17.

18. Kimberly-Clark has used, adopted, appropriated and/or copied, without authorization, the McAirLaid's Trade Dress. Photographs of McAirLaid's absorbent incontinence bed pads and Kimberly-Clark's GoodNites® Bed Mats depicting their identical point pattern design are attached hereto as Exhibit F (McAirLaid's absorbent incontinence bed pads) and Exhibit G (Kimberly-Clark's GoodNites® Bed Mats) and are incorporated herein by reference.

Response

Kimberly-Clark admits that McAirLaid's alleges that a photograph of McAirLaid's absorbent incontinence bed pads was attached to the Complaint as Exhibit F, and also that McAirLaid's alleges that a photograph of Kimberly-Clark's GoodNites® disposable mats for children experiencing bedwetting was attached to the Complaint as Exhibit G. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 18.

19. McAirLaid's has not licensed the McAirLaid's Trade Dress to Kimberly-Clark, nor has McAirLaid's authorized Kimberly-Clark to use or copy the McAirLaid's Trade Dress in any way.

Response

Kimberly-Clark admits that McAirLaid's has not granted it a license with respect to the alleged McAirLaid's Trade Dress or authorized Kimberly-Clark to use or copy the alleged McAirLaid's Trade Dress, but Kimberly-Clark denies that any such license or authorization is or was necessary. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 19.

20. Through its use, adoption and/or copying of the McAirLaid's Trade Dress, without any authorization, Kimberly-Clark is attempting to use or mimic the McAirLaid's Trade Dress in which McAirLaid's has invested significant time, money, and other resources.

Response

Kimberly-Clark denies the allegations of Paragraph No. 20.

21. Kimberly-Clark's use, adoption, appropriation and/or copying of the McAirLaid's Trade Dress to identify, advertise, market, promote and sell the same or similar type of products sold by McAirLaid's, has caused, and unless enjoined is likely to

continue to cause, confusion or mistake among, or to deceive, the consuming public as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirloads.

Response

Kimberly-Clark denies the allegations of Paragraph No. 21.

22. On July 13, 2012, counsel for McAirloads sent a letter to Kimberly-Clark demanding that Kimberly-Clark cease and desist immediately from its unauthorized use of the McAirloads Trade Dress (the "Cease and Desist Letter"). A copy of the Cease and Desist Letter is attached hereto as **Exhibit H** and is incorporated herein by reference.

Response

Kimberly-Clark admits that a copy of a July 13, 2012 letter from McAirloads's counsel to Kimberly-Clark was attached to the Complaint as Exhibit H. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 22.

23. In response to the Cease and Desist Letter, Kimberly-Clark denied infringing the McAirloads Trade Dress and refused to cease and desist. Since that time, Kimberly-Clark's use of the McAirloads Trade Dress has actually increased and become more pervasive.

Response

Kimberly-Clark admits that it responded to the July 13, 2012 letter from McAirloads's counsel to Kimberly-Clark, and that, in so doing, Kimberly-Clark, among other things, denied infringing the alleged McAirloads Trade Dress. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 23.

24. McAirloads has been damaged as a consequence of Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 24.

25. In addition, Kimberly-Clark's conduct will cause McAirloads further immediate and irreparable injury, loss and damage for which McAirloads will have no adequate remedy at law.

Response

Kimberly-Clark denies the allegations of Paragraph No. 25.

26. Kimberly-Clark's use, adoption, appropriation and/or copying of the McAirloads Trade Dress without authorization shows willful misconduct, malice, fraud, wantonness, oppression, or the entire lack of care which would raise the presumption of conscious indifference to its consequences.

Response

Kimberly-Clark denies the allegations of Paragraph No. 26.

**COUNT I
(Federal Trade Dress Infringement)
(15 U.S.C. § 1114)**

27. McAirloads incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

Response

Kimberly-Clark incorporates herein and realleges, as if fully set forth in this paragraph, the responses in the foregoing paragraphs above, inclusive.

28. McAirload's owns U.S. Registration No. 4,104,123 for the McAirloads Trade Dress.

Response

Kimberly-Clark admits that the face of the registration certificate for U.S. Trademark No. 4,104,123 lists McAirloads as the registrant. Except to the extent explicitly admitted, Kimberly-Clark denies the allegations of Paragraph No. 28.

29. The McAirloads Trade Dress, as registered, is nonfunctional, inherently distinctive or has acquired secondary meaning and is associated in the mind of the public uniquely with McAirloads.

Response

Kimberly-Clark denies the allegations of Paragraph No. 29.

30. Kimberly-Clark's GoodNites® Bed Mats which bear the Infringing Trade Dress copy and infringe the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 30.

31. Kimberly-Clark's importing, distributing, selling and marketing of its GoodNites® Bed Mats with the Infringing Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirloads, and thus infringes McAirloads' exclusive rights in and to the McAirloads Trade Dress in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

Response

Kimberly-Clark denies the allegations of Paragraph No. 31.

32. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirloads Trade Dress deprives McAirloads of its exclusive right to control, and benefit from, the McAirloads Trade Dress. If permitted to continue, Kimberly-Clark's actions will nullify McAirloads' right to the exclusive use of the McAirloads Trade Dress, free from infringement, and will have a substantial and adverse effect on McAirloads' existing and projected future interstate business of marketing and selling its absorbent pads bearing the McAirloads Trade Dress in violation of 15 U.S.C. § 1114.

Response

Kimberly-Clark denies the allegations of Paragraph No. 32.

33. Kimberly-Clark's unauthorized use of the McAirloads Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirloads' advertising and promotion and from the resultant goodwill in the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 33.

34. Kimberly-Clark's actions have damaged and continue to damage McAirloads and its business.

Response

Kimberly-Clark denies the allegations of Paragraph No. 34.

35. Unless temporarily, preliminarily and permanent enjoined pursuant to 15 U.S.C. § 1116, Kimberly-Clark's conduct will cause McAirlands irreparable harm for which there exists no adequate remedy at law.

Response

Kimberly-Clark denies the allegations of Paragraph No. 35.

36. McAirlands is entitled to recover from Kimberly-Clark all damages McAirlands has suffered due to Kimberly-Clark's infringing conduct, costs, as well as Kimberly-Clark's profits obtained from its infringing conduct, in an amount to be proved at trial and to be trebled, pursuant to 15 U.S.C. § 1117.

Response

Kimberly-Clark denies the allegations of Paragraph No. 36.

37. Kimberly-Clark's actions are willful and deliberate and amount to exceptional circumstances, justifying an award of attorneys' fees to McAirlands pursuant to 15 U.S.C. § 1117.

Response

Kimberly-Clark denies the allegations of Paragraph No. 37.

**COUNT II
(Federal Unfair Competition)
(15 U.S.C. § 1125(a))**

38. McAirlands incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

Response

Kimberly-Clark incorporates herein and realleges, as if fully set forth in this paragraph, the responses in the foregoing paragraphs above, inclusive.

39. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirlands Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products bearing the Infringing Trade Dress sold by Kimberly-Clark and the products bearing the McAirlands Trade Dress sold by McAirlands, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

Response

Kimberly-Clark denies the allegations of Paragraph No. 39.

40. Kimberly-Clark's unauthorized use, adoption, appropriation, and/or copying of the McAirloads Trade Dress falsely suggests an affiliation or connection with, or sponsorship or approval of, Kimberly-Clark and its products by McAirloads, and/or of McAirloads and its products by Kimberly-Clark, in violation of 15 U.S.C. § 1125(a).

Response

Kimberly-Clark denies the allegations of Paragraph No. 40.

41. Kimberly-Clark's actions constitute unfair competition and false designation of origin in violation of 15 U.S.C. § 1125(a).

Response

Kimberly-Clark denies the allegations of Paragraph No. 41.

42. Kimberly-Clark's unauthorized use of the McAirloads Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirloads' advertising and promotion and from the resultant goodwill in the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 42.

43. Kimberly-Clark's actions have damaged and continue to damage McAirloads and its business.

Response

Kimberly-Clark denies the allegations of Paragraph No. 43.

44. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirloads irreparable harm for which there exists no adequate remedy at law.

Response

Kimberly-Clark denies the allegations of Paragraph No. 44.

45. McAirloads is entitled to recover from Kimberly-Clark all damages McAirloads has suffered due to Kimberly-Clark's infringing conduct, costs, as well as Kimberly-Clark's profits obtained from its infringing conduct, in an amount to be proved at trial and to be trebled, pursuant to 15 U.S.C. § 1117.

Response

Kimberly-Clark denies the allegations of Paragraph No. 45.

46. Kimberly-Clark's actions are willful and deliberate and amount to exceptional circumstances, justifying an award of attorneys' fees to McAirLaid's pursuant to 15 U.S.C. § 1117.

Response

Kimberly-Clark denies the allegations of Paragraph No. 46.

**COUNT III
(Common Law Trade Dress Infringement)**

47. McAirLaid's incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

Response

Kimberly-Clark incorporates herein and realleges, as if fully set forth in this paragraph, the responses in the foregoing paragraphs above, inclusive.

48. McAirLaid's is the owner of all right and title to the distinctive McAirLaid's Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 48.

49. The McAirLaid's Trade Dress is nonfunctional, inherently distinctive or has acquired secondary meaning and is associated in the mind of the public uniquely with McAirLaid's.

Response

Kimberly-Clark denies the allegations of Paragraph No. 49.

50. McAirLaid's has prior and exclusive rights to use its McAirLaid's Trade Dress to identify, market, promote and sell its medical and hygienic absorbent pads, including absorbent incontinence bed pads.

Response

Kimberly-Clark denies the allegations of Paragraph No. 50.

51. Kimberly-Clark's GoodNites® Bed Mats copy and infringe the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 51.

52. Kimberly-Clark's importing, distributing, selling and marketing of its GoodNites® Bed Mats with the Infringing Trade Dress has caused a likelihood of confusion, mistake or deception as to the source, origin, sponsorship or approval of the products sold by Kimberly-Clark and by McAirloads, and thus infringes McAirloads' exclusive rights in and to the McAirloads Trade Dress in violation of the common law of the Commonwealth of Virginia.

Response

Kimberly-Clark denies the allegations of Paragraph No. 52.

53. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirloads Trade Dress deprives McAirloads of its exclusive right to control, and benefit from, the McAirloads Trade Dress. If permitted to continue, Kimberly-Clark's actions will nullify McAirloads' right to the exclusive use of the McAirloads Trade Dress, free from infringement, and will have a substantial and adverse effect on McAirloads' existing and projected future business of marketing and selling its absorbent pads bearing the McAirloads Trade Dress in violation of the common law of the Commonwealth of Virginia.

Response

Kimberly-Clark denies the allegations of Paragraph No. 53.

54. Kimberly-Clark's unauthorized use of the McAirloads Trade Dress has resulted in Kimberly-Clark unfairly benefiting from McAirloads' advertising and promotion and from the resultant goodwill in the McAirloads Trade Dress.

Response

Kimberly-Clark denies the allegations of Paragraph No. 54.

55. Kimberly-Clark's actions have damaged and continue to damage McAirloads and its business.

Response

Kimberly-Clark denies the allegations of Paragraph No. 55.

56. McAirLaid is entitled to recover its damages from Kimberly-Clark in an amount to be proved at trial.

Response

Kimberly-Clark denies the allegations of Paragraph No. 56.

57. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirLaid irreparable harm for which there exists no adequate remedy at law.

Response

Kimberly-Clark denies the allegations of Paragraph No. 57.

**COUNT IV
(Common Law Unfair Competition)**

58. McAirLaid incorporates herein and realleges, as if fully set forth in this paragraph, the allegations in the foregoing paragraphs above, inclusive.

Response

Kimberly-Clark incorporates herein and realleges, as if fully set forth in this paragraph, the responses in the foregoing paragraphs above, inclusive.

59. Kimberly-Clark's unauthorized use, adoption, appropriation and/or copying of the McAirLaid Trade Dress has misled and continue to mislead and deceive the public as to the source of the products bearing the McAirLaid Trade Dress and falsely suggests a connection with McAirLaid, each of which constitutes unfair competition and false designation of origin in violation of the common law of the Commonwealth of Virginia.

Response

Kimberly-Clark denies the allegations of Paragraph No. 59.

60. Kimberly-Clark's actions have damaged and continue to damage McAirLaid and its business.

Response

Kimberly-Clark denies the allegations of Paragraph No. 60.

61. McAirlands is entitled to recover its damages from Kimberly-Clark in an amount to be proved at trial.

Response

Kimberly-Clark denies the allegations of Paragraph No. 61.

62. Unless temporarily, preliminarily and permanently enjoined, Kimberly-Clark's conduct will cause McAirlands irreparable harm for which there exists to adequate remedy at law.

Response

Kimberly-Clark denies the allegations of Paragraph No. 62.

WHEREFORE CLAUSE

The paragraphs following the WHEREFORE are not allegations to which a response is required.

To the extent a response is required, Kimberly-Clark denies the same.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state claims upon which relief may be granted.
2. McAirlands's claims are barred because any alleged trade dress is merely functional, and is therefore not protectable. McAirlands has advertised the utilitarian advantages of its alleged trade dress and owns one or more utility patents that disclose the utilitarian advantages of the alleged trade dress. Moreover, the use of "dot" embossing carries with it significant competitive advantages, including, but not necessarily limited to, its superior strength to other embossing designs. In light of the functional nature of the asserted design, McAirlands is barred from obtaining the requested relief.
3. McAirlands's claims are barred because its alleged trade dress has not acquired distinctiveness or secondary meaning in the minds of the consuming public, and is therefore not protectable. Indeed, numerous third parties have used, and are using, identical and/or similar

designs on products identical and/or related to those of McAirLaid's, rendering such alleged trade dress commonplace, weak and entitled to no trademark protection.

4. McAirLaid's claims are barred because any alleged trade dress is merely a background design on McAirLaid's product and does not function as an indicator of source or as a trademark.

5. McAirLaid's claims are barred because Kimberly-Clark does not use the dot pattern on its GoodNites[®] disposable mats for children experiencing bedwetting as a trademark, and is therefore incapable of creating any likelihood of confusion with McAirLaid's product.

6. Kimberly-Clark reserves the right to assert additional defenses that may be discovered during the course of further discovery and investigation.

COUNTERCLAIM

Counterclaim-Plaintiff Kimberly-Clark Global Sales, LLC ("Kimberly-Clark") alleges as follows:

NATURE OF THE ACTION

1. This lawsuit is a meritless attempt by McAirLaid's to obtain exclusive rights to dotted embossing commonly found on personal care, medical and personal hygiene products, despite the fact that such embossing is merely functional and is not distinctive or associated in the minds of consumers with McAirLaid's. Accordingly, Kimberly-Clark seeks cancellation of McAirLaid's federal trademark registration on the grounds that such trade dress is merely functional and lacking secondary meaning or acquired distinctiveness.

PARTIES

2. Kimberly-Clark Global Sales, LLC is a Delaware corporation with its principal place of business located at 2100 Winchester Road, Neenah, WI 54956.

3. Upon information and belief, McAirlands Inc. is a Virginia corporation with its principal place of business located at 180 Corporate Road, Rocky Mount, Virginia 24151.

JURISDICTION AND VENUE

4. This counterclaim arises under the Lanham Act, 15 U.S.C. §§ 1051, *et seq.*

5. This Court has subject matter jurisdiction over this counterclaim under 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338.

6. This Court has personal jurisdiction over McAirlands by virtue of it being a Virginia corporation, its transaction of business within this state and by virtue of its having filed its Complaint in this Court, so as to submit itself to the jurisdiction and process of this Court.

FACTUAL BACKGROUND

7. For more than eighteen years, Kimberly-Clark has provided consumers with trusted protection from children's nighttime bedwetting through its line of products offered under the GoodNites® brand.

8. One such product includes the GoodNites® bed mats, which are disposable cloth-like mats that help protect bedding from childhood bedwetting by adhering to a fitted sheet.

9. In order to maximize the effectiveness of the product, GoodNites® disposable bed mats feature dotted embossing. Such embossed dots are functional, for they are essential to the use and purpose of the GoodNites® bed mats product.

10. The embossing on the GoodNites® bed mats product – in addition to numerous other absorbent products – is the result of a bonding process that helps create the strength and integrity of the product. Among other things, the embossed dots prevent the layers of the product from separating (*i.e.*, they add strength) and they prevent the absorbent layer of the product from bunching (*i.e.*, they help the product function properly).

11. Such benefits from embossing and “dot” embossing, in particular, have been widely-recognized in the industry for many years. For example, as early as 1983, Kimberly-Clark obtained a patent (U.S. Patent No. 4,379,192) that recognized the strength benefits of an embossed dot design with respect to “absorbent barriers.” Figure 1. Such a functional benefit was also noted in U.S. Patent No. 5,925,026. **Exhibit A.**

12. For this reason, in developing the GoodNites[®] disposable bed mats, Kimberly-Clark conducted significant testing of the product. For instance, Kimberly-Clark had considered using diamond embossing but, after testing revealed that the “dots” caused the product to be more than six times stronger than the “diamonds,” Kimberly-Clark selected the “dot” embossing in order to manufacture a high quality and functionally reliable product.

13. McAirlands’s absorbent medical and hygienic pad products also feature dotted embossing, and McAirlands recognizes this functional benefit to embossed dots as well. For instance, in McAirlands’s marketing materials, McAirlands only depicts the “dots” in pictures purporting to show functional benefits of the product. **Exhibit B.** Moreover, McAirlands owns two utility patents—U.S. Patent No. 6,675,702 and U.S. Application No. 12/470,897 (with expected issue date of January 1, 2013 and expected patent number of 8,343,612)—both of which disclose the use of embossed dots for various functional purposes that include fusing layers of absorbent pads together. **Exhibit C.**

14. It is this functional use of embossed dots – the fusing of the layers together in a way to maximize strength and prevent “bunching” – that Kimberly-Clark tested and similarly found a significant utility benefit.

15. Given these clear and important functional benefits, it is not surprising that, in addition to Kimberly-Clark’s and McAirlands’s uses of dotted embossing in connection with

personal care, medical and personal hygiene products, numerous other third parties use such dotted embossing on similar and/or related products. Such products include, but are not limited to, the following: DG Health Everyday Liners, CVS Pharmacy Liners, TENA Serenity Liners, CVS Pharmacy Women's Underwear, CVS Pharmacy Non-Stick Pads, TENA Serenity Pads, CVS Pharmacy Sterile Surgical Pads, Walgreen's Watershield Adhesive Bandages, Walgreen's Flexible Fabric Adhesive Bandages and Walgreen's Exfoliating Cotton Squares.

16. On information and belief, such embossed dots contribute to an important functional element in these products as well; that is, the embossed dots improve the strength, durability and functionality of the products.

17. Moreover, given the widespread and near ubiquitous use of embossed dots in various personal care, medical and personal hygiene products, among others, such dots do not and cannot serve as a source-identifier. Put differently, when a consumer sees such dots, the consumer does not associate them with a particular firm or entity; to the contrary, the consumer recognizes them as a product feature that is present on various products he or she encounters when purchasing personal care, medical and personal hygiene products.

18. Despite the functional nature of dotted embossing and lack of distinctiveness of or secondary meaning in the same, McAirLaid is listed in the records of the United States Patent and Trademark Office as the owner of United States Trademark Registration No. 4,104,123 for a mark consisting of "a three-dimensional configuration of the goods where the mark is a repeating pattern of embossed dots on the goods," issued February 28, 2012. Such registration is invalid and should be cancelled.

COUNT I

Cancellation of U.S. Trademark Registration No. 4,104,123

19. Kimberly-Clark repeats and realleges the allegations of Paragraph Nos. 1-18.

20. 15 U.S.C. § 1064 provides that the registration for a mark may be cancelled at any time if the registered mark is functional.

21. 15 U.S.C. § 1064 also provides that a registration for a mark less than five years old may be cancelled for lack of secondary meaning or acquired distinctiveness.

22. As a first and independent ground for cancellation of U.S. Registration No. 4,104,123, the registration was granted improperly because the purported mark serves a functional or utilitarian purpose and thus cannot serve as a trademark.

23. As a second and independent ground for cancellation of U.S. Registration No. 4,104,123, the registration was granted improperly because the purported mark is not inherently distinctive, nor has it acquired distinctiveness or secondary meaning in the minds of the consuming public.

24. In view of McAirlands's allegations in this action, including its allegation that Kimberly-Clark has infringed the purported mark covered by U.S. Registration No. 4,104,123, Kimberly-Clark believes that it is or will be damaged by the continued registration of U.S. Registration No. 4,104,123.

25. This Court has the power and authority to cancel U.S. Registration No. 4,104,123 under 15 U.S.C. § 1119.

PRAYER FOR RELIEF

WHEREFORE, Kimberly-Clark prays for an entry of an order judgment:

1. Finding that McAirlands takes nothing by way of its Complaint, and that said Complaint be dismissed with prejudice;

2. Ordering the cancellation of U.S. Trademark Registration No. 4,104,123; and

3. Awarding Kimberly-Clark its costs, expenses and reasonable attorneys' fees and other relief this Court deems just.

DEMAND FOR JURY TRIAL

Kimberly-Clark demands trial by jury for all issues so triable.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to the following:

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